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U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

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June 30, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW Suite 222
Washington, D.C. 20554

RE: MM Docket Nos. 96-222, 96-197, 91-221, 87-154.

Dear Mr. Caton:

Today, the attached letter was delivered by the undersigned on behalf of the U.S. Small Business Administration, Office of Advocacy, to Chairman Reed Hundt in reference to the aforementioned proceedings. Pursuant to the Commission's ex parte rules, enclosed are ten (10) copies of the letter for inclusion in the public record.

Please call my office if you have any questions (202) 205-6533.

Sincerely,

S. Jenell Trigg
Assistant Chief Counsel for Telecommunications

cc: Chairman Reed E. Hundt
Commissioner James H. Quello
Commissioner Susan Ness
Commissioner Rachelle B. Chong

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FEDERAL COMMUNICATIONS COMMISSION
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June 30, 1997

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N. W. Suite 814
Washington, D.C. 20554

RE: *In re* Broadcast Television National Ownership Rules, MM Dkt. No. 96-222; Review of the Commission's Regulations Governing Television Broadcasting, MM Dkt. No. 91-221; Reexamination of the Commission's Cross-Interest Policy MM Dkt. No. 87-154; Newspaper/Radio Cross Ownership Waiver Policy, MM Dkt. No. 96-197

Dear Chairman Hundt:

I am writing to comment on the series of Federal Communications Commission's rule makings regarding broadcast ownership. The Office of Advocacy's statutory duties, *inter alia*, include serving as a focal point for concerns regarding the government's policies as they affect small business and representing the views of small business before other federal agencies. 15 U.S.C. § 634c(1)-(4). We are concerned about the impact that such rule makings will have on small entities, including those owned by minorities and women.

RECOMMENDATION

The Office of Advocacy supports the recommendation of the National Telecommunications and Information Administration (NTIA) that the Commission should not relax the local television ownership rules without undertaking a complete assessment of marketplace changes in industry competition and its impact on diversity.[1] Since the enactment of the Telecommunications Act of 1996 ("1996 Act")[2] the rate of mergers and acquisitions of radio and television properties has been staggering.[3] This rate of concentration threatens not only the diversity of broadcast ownership voices, but the public interest as well.

RATIONALE

Market Concentration

In addition to the many sound reasons stated by NTIA that support the complete evaluation of the broadcast industry and marketplace prior to the repeal or loosening of the broadcast ownership rules, the Office of Advocacy has identified additional concerns. The radio and television broadcast industries do not operate in a vacuum. Collateral industries include programming, syndication, and advertising.

[1] Letter from Larry Irving, Assistant Secretary for Communications and Information, National Telecommunications and Information Administration, U.S. Dept. of Commerce, to Reed E. Hundt, Chairman, Federal Communications Commission 1 (May 22, 1997).
[2] Pub. L. No. 104-104, 110 Stat. 56 (1996).
[3] *See e.g.*, Comments of Black Citizens for a Fair Media, *et al.*, MM Dkt No. 96-197, at 14.

Although the Commission does not have direct regulatory authority over these industries, the Commission has recognized that these industries are inter-related with the broadcast industry and thus, are within the Commission's authority to review.[4] It has come to our attention that small independent television programmers are having increased difficulty in finding outlets for their product because of the demands from network and large group owners for financial ownership of their programming. Such corporate entities now control an increased number of video programming outlets, increasing their market power. Therefore, what impact the repeal of the Commission's Syndication and Financial Interest ("fin/syn") rules will have on competition and the source of competition, namely small firms, needs to be evaluated before further relaxation of the broadcast ownership rules.

The Commission acknowledged in its fin/syn *1995 Report & Order*, that it was "in the normal course of its regulatory business to ensure that [acquisitions] do not undermine the competitiveness of the production and distribution markets."[5] The Commission's last complete review of the video production and distribution markets was in 1993 when it repealed significant portions of the fin/syn rules.[6] Much has changed in the industry and regulatory landscape since 1993. We are not persuaded that the benefits of acquisitions and mergers outweigh the disadvantages, nor that it is more efficient and expedient for programmers, syndicators, and advertisers to deal with an entity with multiple broadcast outlets, "one-stop shopping" per se. Large entities can use undue influence and leverage against smaller entities that do not have the same bargaining power to force smaller entities to make contract concessions they would not make if there were a more level playing field.[7]

The cumulative effect on programming, syndication, and advertising industries caused by relaxed local television ownership rules, coupled with the concentration of radio ownership, Local Marketing Agreements (LMAs) for radio and television stations, plus repeal of the newspaper cross-ownership rule, is predictable, but unmeasurable since we are dealing with projected impact and can only draw upon analogous experiences in other industries. These are industry conditions not yet addressed in full by the FCC nor the Department of Justice.[8] Complicating this situation further is the forthcoming transition to digital television where incumbent television licensees will have an additional 6 MHz that that will allow transmission of up to 4 new standard digital channels. This transition to digital does not increase broadcast ownership - just the number of channels controlled by incumbents. Moreover, a corporate entity may be well within the statutory limits of ownership in one broadcast medium (i.e., maximum 35% national

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[4] *See e.g.*, *In Re* Review of the Syndication and Financial Interest Rules, Sections 73.659 - 73.663 of the Commission's Rules, *Report and Order*, 10 FCC Rcd. 12165 (1995) [*1995 Report & Order*].

[5] *Id.* para. 25 (referring to the then recent announcements of Walt Disney Company's plan to acquire the ABC network and Westinghouse Electric Corp.'s plan to purchase CBS).

[6] *In re* Evaluation of the Syndication and Financial Interest Rules, *Second Report and Order*, 8 FCC Rcd. 3282, *recon. granted in part*, *Memorandum Opinion and Order*, 8 FCC Rcd. 8270 (1993), *aff'd sub nom. Capital Cities/ABC, Inc. v. FCC*, 29 F.3d. 309 (7th Cir. 1994).

[7] The networks' potential anti-competitive use of market power was discussed at length in the *Second Report and Order*, paras. 30-37, and the *1995 Report & Order*, para. 24. Upon the 1995 expiration of the rules, the Commission found "no probative evidence" that the ABC, NBC, and CBS networks had exercised undue market power since the 1993 review. *Id.*

[8] The DoJ has acknowledged that it has limited experience "regarding the competitive effect of mergers involving broadcast television stations operating in the same market." Letter from Joel I. Klein, Acting Assistant Attorney General, Antitrust Division, Dept. of Justice, to Reed Hundt, Chairman, Federal Communications Commission 4 (May 8, 1997).

audience reach for television ownership),[9] but could own and/or control a large percentage of media outlets nationally, or on a regional and local basis.[10]

The Office of Advocacy does not categorically reject the value of multiple ownership. We believe that the Supreme Court's reaffirmation of the important governmental interest of "promoting the widespread dissemination of information from a *multiplicity of sources*"[11] means that such sources *include* small stations, minority, and women-owned stations. We also recognize that LMAs have contributed to the success of several small or "poorly-performing" stations and, subsequently, may provide additional benefits such as economies of scale, enhanced programming, and community outreach.[12] However, without a full review of the beneficial *and* non-beneficial cumulative impact of changing factors in the broadcast industry, it will be too late to prevent the potential systematic elimination of small, minority, and women-owned stations.

We applaud the Commission's recent request for further data from television licensees that operate brokered stations under LMAs.[13] It would also be appropriate and expedient for the Commission to incorporate into its analysis the results from the FCC's *Annual Notice of Inquiry* into the status of video competition.[14] In this *NOI* the Commission has sought, *inter alia*, public comment on the impact of horizontal concentration and vertical integration[15] and changes in the industry that may occur when digital television is fully implemented.[16] There is a critical need to incorporate these findings in the above-captioned rule makings, in addition to undertaking the same analysis in today's environment - *before* DTV is fully implemented.[17] We also encourage the Commission to undertake a duopoly study that will research the impact of multiple ownership relationships on small group-owned, stand-alone, minority, and women-owned stations. [18]

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[9] Section 202(c)(1) of the 1996 Act.

[10] For example, Paxson Communication Corp.'s pending acquisition of WEFC (Ch. 38 in Indiana) will account for 102 broadcast properties reaching 58% of U.S. TV Households. Communications Daily, May 30, 1997.

[11] *Turner Broadcasting System, Inc. v. FCC*, 65 U.S.L.W. 4209, 4212 (U.S. Mar. 31, 1997) (quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994).

[12] *See e.g.*, Consolidated Comments of Sinclair Broadcast Group, Inc., MM Dkt. Nos. 91-221, 94-150, at 7.

[13] Commission Seeks Further Information Regarding Television LMAs, *FCC Public Notice*, DA 97-1246, released June 17, 1997.

[14] *In re* Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, *Notice of Inquiry*, CS Dkt. No. 97-141, FCC-97-194, adopted June 3,1997 and released June 6, 1997.

[15] *Id.* paras. 10-13.

[16] *Id.* para.8.

[17] The Commission's biennial review in 1998 of its ownership rules, as mandated by Section 202(h) of the 1996 Act, may be completed too late for these proceedings.

[18] For example, are minority-owned stations involved in LMAs? If so, are they likely to be the dominant or servient partners? Why? What effect, if any, does multiple radio station ownership have on small, minority, or women owned competitors in the same market? Loss of market share? Loss of advertising support? Is there an effect on programming?

Diversity

The Commission's ownership rules, especially those related to minorities and women, have traditionally been rooted in the promotion of programming *diversity.*[19] However, the measure of diversity lies not in whether there is a *variety* of programming, but should be measured on how diversity of ownership effects programming-related *decisions.*[20] Such diversity is especially important in the news context, where decisions on how a story is selected, reported, written, edited, and placed in a news broadcast - including what on-air talent will deliver the news, are influenced directly or indirectly by decisions made at the ownership level.[21] Diversity also influences how a licensee will fulfill a station's equal opportunity employment program responsibilities[22] by establishing the individual station's EEO policies and a commitment that its' objectives will be met. Diversity determines the type and scope of community involvement, what staff and budget resources will be allocated for a community project or public affairs program, and what level of station personnel will meet with community leaders or organizations - General Manager or the Public Affairs Director. The selection/promotion of personnel and community involvement, in addition to audience demographics and Nielsen ratings, influence programming. Diversity of ownership, and thus diversity of viewpoint, is important to the core of a licensee's total operation. We are concerned that true diversity is threatened when an increased number of broadcast, cable, and newspaper properties operate under a single corporate banner.

Therefore, we encourage the Commission to expedite the commencement *and* completion of the long-awaited independent *Adarand* study. The Commission first identified the need for such a study in June 1995 soon after the Supreme Court's release of *Adarand Constructors Inc. v. Pena*, 115 S. Ct. 2097 (1995).[23] The need for the study has not changed. In fact, given the enactment of the 1996 Act, it has become more important than ever to preserve and encourage minority and women ownership. We commend your commitment to the study for the broadcasting industry as noted in the *Report* on the implementation of Section 257 of the 1996 Act.[24] We hope that the Commission will not change its rules prior to the completion of this study.

CONCLUSION

The Office of Advocacy understands there is considerable pressure from select industry and congressional leaders to repeal the multiple and cross-ownership restrictions immediately. Nonetheless, the Commission has a three-fold statutory duty to fully review the short and long term impact of its proposals on small businesses and new entrants, before it changes its rules. The first duty is to regulate and distribute broadcast licenses in the public interest,[25] the second is to identify and eliminate market

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[19] *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3012 (1990) ("From its inception, public regulation of broadcasting has been premised on the assumption that diversification of ownership will broaden the range of programming available to the broadcast audience.).

[20] *See e.g.*, Comments of Black Citizens for a Fair Media *et al.*, *supra note* 3, at 15-17; *see also* Comments of Media Access Project, *et al.*, MM Dkt. Nos. 91-221, 96-222, 87-7, 87-8, at 8-11. *But see* e.g., Comments of Pulitzer Publishing Company, MM Dkt. 96-197, at 4.

[21] *See* Jannette L. Dates and William Barlow, Split Image 389-418 (1990).

[22] 47 C.F.R. § 73.2080.

[23] Separate Statement of Commissioner Rachelle B. Chong, Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, *Report*, GN Dkt. No. 96-113, FCC 97-164 (adopted and released May 8, 1997).

[24] Section 257 Report, para. 225.

[25] 47 U.S.C. § 307.

entry barriers to small businesses and new entrants,[26] and the third, pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, is to identify the significant economic impact that changes in the Commission rules would have on small entities.[27] The Office of Advocacy believes that each of these statutory duties would be frustrated without a complete review of today's marketplace.

Yours truly,

Jere W. Glover
Chief Counsel

cc: The Honorable James Quello
The Honorable Susan Ness
The Honorable Rachelle B. Chong

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[26] 47 U.S.C. § 257.

[27] Pub. L. No. 104-121, 110 Stat. 847 (1996), codified at 5 U.S.C. § 601 *et seq.* For example, the Independent Free Papers of America, representing 300 independent local publications, submitted brief comments in MM Dkt. No 96-197 opposing the relaxation of the newspaper cross-ownership rules. However, they expressed a concern that given their late discovery of the Commission's proceeding, they "did not have the time for a detailed analysis of all of the conditions under study by the Commission." *Id.* at 1. They have expressed that given more time, they could provide more details. *Id.* at 2. This organization, unlike the Newspaper Association of America, a larger trade association, is not represented by specialized Washington counsel. *See* Comments of the Newspaper Association of America, MM Dkt. Nos. 91-221, 87-8. We encourage the Commission to take the time to increase its outreach to small entities affected by its broadcast ownership rules, 5 U.S.C. § 609, and incorporate the economic impact on all small entities into its decision-making process.